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OFFICE OF THE GENERAL COUNSEL

M E M O R A N D U M

TO: Chief, Dockets Division

FROM: Associate General Counsel, Litigation Division

SUBJECT: BellSouth Corporation, et al. v. FCC & USA, No. 93-1518 and Freeman Engineering Associates, Inc. v. FCC, No. 93-1520. Filing of two new Notices of Appeal in the United States Court of Appeals for the District of Columbia Circuit

DATE: August 26, 1993

Docket No(s). GEN Docket 90-314 and ET Docket 92-100

File No(s). RM-7617, RM-7760, RM-7782, RM-7860, RM-7977, RM-7878, RM-7979, RM-7980, PP-4, PP-5, PP-11, PP-14, PP-35 through PP-40, PP-53, PP-69, PP-79 through PP-85

This is to advise you that on August 20, 1993, BellSouth Corporation, et al. and on August 23, 1993, Freeman Engineering Associates, Inc., filed with the U.S. Court of Appeals for the District of Columbia Circuit a:

_____ Section 402(a) Petition for Review
__X__ Section 402(b) Notice of Appeal

of the following FCC decision: In the Matter of Amendment of the Commission's Rules to Establish New Narrowband Personal Communications Services, FCC 93-329, released July 23, 1993. Challenges a grant to Mobile Telecommunications Technologies Corporation a pioneer's preference for a nationwide license for the commerical provision of Personal Communications Services in the 900 MHz frequency band.

Due to a change in the Communications Act, it will not be necessary to notify the parties of these filing.

The Court has docketed case as No. 93-1518 and 93-1520 and the attorney assigned to handle the litigation of these cases is John E. Ingle.

Daniel M. Armstrong

cc: General Counsel
Office of Public Affairs
Shepard's Citations

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BellSouth Corporation, BellSouth Enterprises, Inc., and Mobile Communications Corporation of America, *Appellants,*	)	No. 93-1518
v.	)	Filed: 8/20/93
Federal Communications Commission, *Appellee.*	)	

NOTICE OF APPEAL

BellSouth Corporation, BellSouth Enterprises, Inc., and Mobile Communications Corporation of America, ("Appellants"), by their attorneys, hereby give notice that they appeal from the grant of a "pioneer's preference" to Mobile Telecommunication Technologies Corporation ("Mtel") in *Amendment of the Commission's Rules to Establish New Personal Communications Services*, Gen. Docket 90-314 and ET Docket 92-100, *First Report and Order*, FCC 93-329 (July 23, 1993), 58 Fed. Reg. 42,681 (August 11, 1993). A copy of the foregoing decision of the Federal Communications Commission ("FCC") is included as Appendix A.

The Court has jurisdiction of this appeal under 47 U.S.C. § 402(b), which governs the grant or denial of radio licenses and actions ancillary thereto,[1/] 5 U.S.C. § 702, and F.R.A.P.

1/ *See Tomah-Mauston Broadcasting Co. v. FCC*, 306 F.2d 811, 812 (1962); *WHDH, Inc. v. FCC*, 457 F.2d 559, 561 (1972). The Commission has held that the award of a pioneer's preference to Mtel constitutes an "effective[] . . . guarantee" of a license. *Pioneer's Preference*, Gen. Docket 90-217, *Report and*

(continued...)

Rule 15. Appellants provide services directly or through subsidiaries that will compete with the service proposed by Mtel. Accordingly, Appellants are adversely affected by the grant of a pioneer's preference to Mtel and have standing to appeal pursuant to 47 U.S.C. § 402(b)(6). To the extent that the FCC's action is not deemed ancillary to licensing, the Court has jurisdiction to review the FCC's decision under 47 U.S.C. § 402(a) and 28 U.S.C. § 2342.[2/]

Pursuant to 47 U.S.C. § 402(c), Appellant plans to show that the FCC's decision (1) violated the Communications Act and the Administrative Procedure Act, (2) was arbitrary and capricious, (3) was not supported by substantial evidence, and (4) represented unreasoned decisionmaking. These legal deficiencies include the following:

A. In awarding a pioneer's preference to Mtel, the FCC did not require MTel to build what it proposed. Thus, Mtel could merely construct a conventional paging network. This consititutes arbitrary and capricious agency action.

1/ (...continued)
Order, 6 FCC Rcd. 3488, 3492 (1991), *recon. in part*, 7 FCC Rcd. 1808, 1808 (1992), *recon. denied*, 8 FCC Rcd. 1659 (1993). Accordingly, this appears to be an action ancillary to licensing that is subject to appeal under § 402(b).

2/ This Court has jurisdiction over cases brought under both §§ 402(a) and 402(b). These provisions are mutually exclusive, but in some cases, as here, the subject matter of an FCC action may arguably be subject to either. This notice of appeal is timely filed in either case. The Court has held that under these circumstances, and when no party will be prejudiced thereby, it will treat a notice of appeal as a petition for review if § 402(a) is found to be applicable. *Capital Cities Communications, Inc. v. FCC*, 554 F.2d 1135, 1136 n.1 (D.C. Cir. 1976).

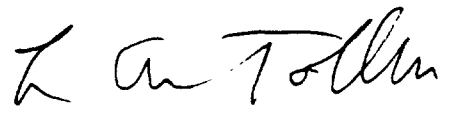
B. The FCC tainted its proceedings by issuing a "tentative decision" that Mtel was entitled to a preference based on inadequate evidence and then using later-filed information to bolster its improper tentative decision. This does not comport with reasoned decisionmaking and due process of law.

C. The standards used by the FCC for determining whether to award a pioneer preference to MTel were too vague, imprecise, varying, and subjective to support its decision. This resulted in *ad hoc* threshold eligibility standards for exempting Mtel from mutual exclusivity with others, violating the principles of ***Ashbacker Radio Co. v. FCC***, 326 U.S. 327 (1945). This was arbitrary and capricious and constituted unreasoned decisionmaking.

D. The FCC determined that Mtel's proposal was "innovative" even though it acknowledged that the proposal merely combined numerous preexisting technologies and applied them to simulcast messaging service. The FCC lacked substantial evidence to support its conclusion.

E. The FCC determined that hearings were unnecessary, asserting that there was no substantial and material question of fact. However, significant factual questions had been raised. Moreover, the FCC failed to follow the procedural requirements of Section 309 of the Communications Act, 47 U.S.C. § 309, and the Administrative Procedure Act, 5 U.S.C. §§ 556, 557. Accordingly, the Commission's award to Mtel was arbitrary and capricious and not in accordance with law.

Respectfully submitted,



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August 20, 1993

IN THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

Freeman Engineering Associates, Inc.,	)	Case No. 93-1520
Appellant	)	Filed: 8/23/93
v.	)	
Federal Communications Commission,	)	
Appellee.	)	

Notice of Appeal

Freeman Engineering Associates, Inc. ("Freeman"), by its attorneys and pursuant to Section 402(b)(6) of the Communications Act of 1934, as amended ("the Act"), 47 U.S.C. §402(b)(6), hereby appeals the decision of the Federal Communications Commission ("FCC"), set forth in First Report and Order (GEN Docket No. 90-314, ET Docket No. 92-100), FCC 93-329, released July 23, 1993 ("R&O") (copy attached), insofar as it granted Mobile Telecommunications Technologies Corporation ("Mtel") a pioneer's preference for a nationwide license for the commercial provision of Personal Communications Services ("PCS") in the 900 MHz frequency band. In support hereof, the following is shown:

1. In the R&O, the FCC: a) adopted certain Rules to govern the provision of commercial PCS in the 900 MHz frequency band; b) awarded Mtel a pioneer's preference for a nationwide 900 MHz band PCS license; c) denied the seventeen remaining requests for pioneer's preferences (including the one filed by Freeman) for 900

MHz band PCS;[1] and d) held that the procedures for awarding pioneer's preferences without a hearing are consistent with the requirements of Section 309 of the Act, 47 U.S.C. §309 and the Administrative Procedure Act, 5 U.S.C. §551 et seq. ("the APA").

2. The R&O was issued in a rulemaking proceeding, but its action in granting Mtel's request for a pioneer's preference, in fact, constitutes the grant of an application for a commercial radio station license.

3. The FCC's procedures for the award of pioneer's preferences are set forth in Section 1.402 of the FCC's Rules, 47 C.F.R. §1.402. Under Section 1.402(d) of the FCC's Rules, 47 C.F.R. §1.402(d), the grant of a pioneer's preference effectively constitutes the grant, without a hearing, of a commercial radio station authorization.[2] The FCC's procedures for the award of pioneer's preferences without a hearing violate Section 309 of Act, as interpreted by the United States Supreme Court in Ashbacker Radio Corp. v. FCC, 326 U.S. 327 (1945) and United States v. Storer Broadcasting Co., 351 U.S. 192 (1956), and the APA. The FCC's award of a pioneer's preference to Mtel is invalid, and should be

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[1] Freeman is filing with the FCC a petition requesting reconsideration of the denial of its request for a pioneer's preference.

[2] 47 C.F.R. §1.402(d) states that "[i]f awarded, the pioneer's preference will provide that the preference applicant's application for a construction permit or license will not be subject to mutually exclusive applications."

set aside, because the pioneer's preference award procedures violate Section 309 of the Act and the APA.

4. For example, the number of commercial radio station licensees serving any given geographic area is a function of the number of radio channels or frequency blocks allocated by the FCC for the provision of service in that given geographic area. The number of channels or frequency blocks is always a finite number and, as a result, only a finite number of licensees can be authorized to serve that area. Not all commercial radio station licenses for the provision of service to a given geographic area will be awarded based upon the grant of pioneer's preferences. In view of the finite number of channels (and hence the finite number of licensees), as a practical matter the FCC cannot grant a pioneer's preference to every applicant whose proposal complies with the requirements of Section 1.402 of the Rules. As a further practical matter, the FCC is essentially required to internally determine (i.e., without notice to the public) the maximum number of pioneer's preferences it desires to award for any given radio service, and to internally perform some form of de facto comparative analysis among the competing applications to decide which pioneer's preference application(s) to grant. The fact that the pioneer's preference award procedures set forth in Section 1.402 of the FCC's Rules foreseeably lend themselves to these types of de facto comparative analyses render the procedures unlawful under Section 309 of the Act and the APA.

5. Freeman is aggrieved, and its interests adversely affected, by the FCC's actions because the procedure described in Paragraph No. 4 would have contributed to the FCC's denial of Freeman's request for a pioneer's preference.

6. Jurisdiction and venue reside in this Court under Section 402(b) of the Act, 47 U.S.C. §402(b).

7. Freeman requests that the R&O be vacated insofar as it granted Mtel's request for a pioneer's preference, that the FCC's procedures for the award of pioneer's preferences be declared unlawful under Section 309 of the Act and the APA, and that the case be remanded to the FCC for further proceedings.

Respectfully submitted,

Freeman Engineering Associates, Inc.

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Dated: August 23, 1993